IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 497 3

A. M. ANDERSON, Receiver of the National Bank of Kentucky, *Petitioner*,

v.

KATHERINE KIRKPATRICK ABBOTT, Administratrix of the Estate of David J. Abbott, deceased, et al., *Respondents*.

REPLY BRIEF FOR PETITIONER.

ROBERT S. MARX,
FRANK E. WOOD,
EDWARD M. BROWN,
HARRY KASFIR,
Attorneys for Petitioner.

Of Counsel; for Petitioner,
NICHOLS, WOOD, MARX & GINTER.

JOHN F. ANDERSON,
Chief Counsel for
Comptroller of the Currency.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

TABLE OF CASES.

STATUTES.

OPINION SOLICITOR GENERAL.

IN THE

Supreme Court of the United States

October Term, 1942

No. 497

A. M. Anderson, Receiver of the National Bank of Kentucky, *Petitioner*,

v.

Katherine Kirkpatrick Abbott, Administratrix of the Estate of David J. Abbott, deceased, et al., *Respondents*.

REPLY BRIEF FOR PETITIONER.

INTRODUCTORY STATEMENT.

Respondents' brief does not challenge, in any respect, the "Preliminary Statement", or the "Facts of the Case", set forth (pp. 2-37) in petitioner's brief. It does not claim that the substance of the Bill of Complaint, at page 6 of our brief, is not fairly and accurately stated. It does not challenge a single fact in our brief with respect to the unhealthy financial condition of the National Bank of Kentucky. It asserts

four technical defenses, severally dealt with later herein, to the Receiver's claim, viz:

(1) Corporate entity of Banco shields respondents.

(2) Respondents did not transfer with knowledge of impending insolvency.

(3) Laurent v. Anderson is conclusive adjudication that Banco, not the respondents, is the real bank stock holder; and that Receiver, by having sued Banco, is barred, under the doctrine of election, from proceeding here against the respondents.

(4) Atherton v. Anderson is conclusive adjudication of the case as to the bank directors.

Respondents' brief, under the caption "The Nature of Receiver's Claim" (pp. 5-10) seeks to make it appear that during the progress of the case petitioner has been inconsistent in the legal theories upon which he bases his right of recovery. This is not fair and is not correct. The statutory liability of national bank shareholders for what became popularly known as the "double assessment" is set forth in Sections 63 and 64 of Title 12, United States Code.

We have never contended that the respondent stockholders of Banco are the *record*, as distinguished from the *real*, owners of the bank shares, or that they are liable because they exchanged bank shares for Banco shares within sixty days of the bank failure. It would have been a simple case indeed had the bank failed within sixty days after Banco started. 12 U. S. C. 64.

The officer and director stockholders of the bank knew, or should have known, at the very time and long before the exchange for Banco shares, that the bank was in trouble and they might well be held liable for the assessment under the "with knowledge of impending failure" provision of Section 64. We do not seek to hold a few of the stockholders on this narrow ground. It would be of little advantage to the

depositors who are the real plaintiffs in this case. We seek to hold every respondent because, as we view the law, the stockholders of a tottering national bank cannot escape liability for double assessment by the exchange of their bank shares for their own holding company shares a few months before it fails, all the while retaining every vestige of control, advantage and opportunity for profit out of the operation of the bank.

We have never been "inconsistent" as to the alternative theories of recovery. They are set forth in the Bill of Complaint (R. 1, p. 56) and summarized at page 6 of our original brief. We have never "indignantly disclaimed" a right of recovery under the "with knowledge of impending failure" clause of Section 64 for the reason that we never made such claim in the first place. It is, and always has been, our claim that the respondents never did part with their interests in the bank. They exchanged a certificate evidencing ownership in the bank for another certificate evidencing the same ownership in the same bank. They never sold their bank stock. They were quite careful not to sell it. They would have been subject to a large income tax liability had they sold it. They called the exchange transaction a "re-organization" (Ex. V, 3, p. 1140). As their lawyer stated, they received back "the same property in another form" (Ex. V. 3, p. 1157) and, as their lawyer further stated, they did not "part with one species of property in exchange for an entirely different species of property". If this be true, and it cannot be questioned, it is submitted that there never was a "transfer" within the meaning of Section 64.

We never "abandoned" what respondents at pages 6, 7, of their brief, referred to as our "fifth ground", for the obvious reason that we never saw or heard of that "ground" until it was printed in their brief in this court. *Our position, before this court, is exactly the same as it has been from the beginning of the case.*

COMMENT ON RESPONDENTS' FACTS.

At page 1 of respondents' brief, BancoKentucky Company is referred to as a "non-banking corporation". This statement, though technically correct, is quite misleading. Banco was not incorporated as a bank. It was, however, created by resolution of the Board of Directors of National Bank of Kentucky. It did not take the significant and similar name "BancoKentucky" in order to disassociate itself from its creator. The very name evidences the fact that the respondents by the exchange were staying in, instead of going out of, the banking business.

At page 2 it is stated that we "alleged" that BancoKentucky "had acquired by purchase" the bank stock. We never made any such allegation. BancoKentucky did not purchase the bank stock. It acquired the certificates under a so-called non-taxable exchange by virtue of which the respondents retained the same interest in the bank and banking business that they had before.

At page 3, it is stated that the District Court "sustained the Receiver's claim" that the holders of the trust certificates were "the actual and real owners of the bank shares" and that the United States Circuit Court of Appeals likewise so held. The Receiver has consistently claimed that the trust certificate holders were the *record* owners of the bank stock and that the stockholders of BancoKentucky were the *real* owners. A detailed statement of what was litigated, and what was decided, in the Keyes, (1 F. Supp. 512) and Laurent (70 F. (2d) 819) cases is made elsewhere in this brief.

At page 5, and elsewhere in respondents' brief, it is stated that the double liability section of the National Bank Act was repealed in 1933. Sections 63 and 64 have not been repealed. An additional section, enacted in 1933, known as Section 64a, provides that the additional liability shall not apply with respect to shares issued after June 16, 1933. It further provides that such additional liability shall cease on July 1, 1937 as to any bank open at that date, providing six

months' published notice be given. The comptroller's records show that there are over fifty national banks in operation today which still have the double liability. Concededly Sections 63 and 64 are in full force and effect with reference to the respondents. A similar double liability still remains on the stockholders of Federal Farm Loan Banks (12 U. S. C. 872).

At page 15 it is stated that the exchange of bank for Banco stock was upon the "*double*" condition that the bank shareholders would acquire a majority of Banco and Banco should acquire a majority of the bank. There was a *third* condition attached to the deal. This provided that Banco "be managed and operated by the Boards of Directors and the officers of the two banks". Respondents did not put the *third* condition in their brief because to do so would seriously, if not conclusively, destroy their claim that Banco was not a bank stock holding company but was a self-sufficient business or operating corporation. If Banco was the type and kind of independent corporation claimed for it by the respondents, why would it surrender its sovereignty to a Board of Directors or the officers of a national bank? And upon what authority, anyway, can a national bank undertake to manage and operate a BancoKentucky?

At pages 15 and 16 an attempt is made to explain why the exchange of bank stock for Banco was a sale for assessment purposes but not a sale for income tax purposes. In reading this explanation we ask this court to consider something that the respondents carefully omitted. Mr. Vaughan, lawyer and counsel for the bank, who handled the deal, testified that when a bank stockholder exchanged bank stock for Banco, he received back "the same property in another form" (R. 3, p. 15). We submit that the exchange of bank stock for Banco stock simply cannot be a "reorganization" to escape taxes and a sale to escape this assessment.

At page 17, it is correctly stated that over five hundred thousand bank shares were exchanged for over a million Banco shares. They say that the bank shares were selling at $47.00 per share and that the interim receipts in the ex-

change sold at $50.00 per share. They calculate therefrom that Banco had an "invested capital" of more than $27,000,000.00. To this they add the cash subscriptions and therefore conclude that Banco had an invested capital of $37,000,000.00. They say nothing about Banco rigging the market on its own shares. They say nothing about the fact that nearly all the cash subscriptions came out of the two banks on loans made on the sole security of Banco stock. The statement referred to here that Banco had an invested capital of nearly $37,000,000.00 read as though it came out of "Brewsters Millions". A mere statement of the fact that it all disappeared in one year is sufficient.

Again it is stated at page 17, that the directors subscribed more for additional Banco shares than their assessment would have been on their original bank shares. This statement is quite true. When a stockholder of a bank, whether he be a director or not, enlarges his investment he increases his contingent liability for assessment. But this is not all. He also gets a larger "interest" in the bank.

At pages 17 and 18, it is pointed out that there were shareholders of Banco who never owned stock in the National Bank of Kentucky. This is perfectly true. Some of this class of shareholders purchased their Banco stock in the open market. Others were stockholders of the small banks in the chain. No distinction as to liability can be made between the two classes. The outsider, who purchased Banco shares, knew that Banco was a bank stock holding company; knew that he was buying an interest in a whole chain of banks, because, as stated in our original brief, Banco was publicized far and wide, listed on the stock markets, and quoted in all the newspapers as bank stock.

At page 18 the stock market crash of October 29, 1929 is inserted. This insertion is made no doubt to lead the court to believe that the stock market crash had something to do with the failure of the National Bank of Kentucky. As pointed out in our original brief, the long-standing loans and overdrafts, criticized by the Bank Examiners, caused

the bank's failure. Loans made on the security of listed stock market shares had nothing to do with it. Neither did the stock market crash. Likewise the loss of 38 per cent of the Bank's deposits came before the market break.

At page 19 the proposed, but never consummated, deal for Banco to acquire a half interest in the insolvent Caldwell & Company is suggested to this court as a cause of the failure of the bank. As we stated in our original brief, this was a frantic last-minute attempt (R. 3, p. 12) of Brown to save Banco by going into partnership with Caldwell and of Caldwell to save Caldwell & Company by going into partnership with Brown. Upon what other theory, using respondents' own words, would Banco, without an appraisement or audit, rely upon Caldwell's guarantee that he had a net worth of $9,000,000.00? The Caldwell assets were never appraised. The whole Caldwell deal was never consummated and consequently the transaction is not pertinent in any way to this case.

At pp. 20, 21, and the top of 22 there is quoted some articles from the Louisville Courier Journal with reference to rumors about Caldwell & Company and the negotiations between Caldwell and Banco. It is claimed that this publicity brought large withdrawals from the National Bank of Kentucky and caused its failure. In our original brief we pointed out that the withdrawals upon the National Bank of Kentucky began prior to April 23, 1927 and that at the time Banco Kentucky was formed, its deposits had already shrunk from fifty-six to thirty-five million, or over 38 per cent.

At various places in their brief respondents suggest that because the National Bank Examiner or the Comptroller of the Currency did, or did not do, something about the rotten condition of National Bank of Kentucky, that therefore, by some mysterious mental process, they as stockholders of the bank should not be held liable for the assessment. At the bottom of p. 11 of respondents' brief is set out the capital, surplus, and undivided profits of the bank represent-

ing a total of $6,442,738.73. At p. 12 they set out the undivided profits at thirteen different quarterly periods from September '27 to September '30. From the statements it is hoped that this court will believe that throughout all this period of time the National Bank of Kentucky was a great big powerful bank. We point out that these figures, as to capital, surplus, and undivided profits, are "book figures", and do not represent actual values.

At various places in their brief respondents say that the Comptroller "approved" a dividend (p. 11); or "congratulated" somebody on the "affiliation" of Louisville Trust with the "splendid" National Bank of Kentucky (p. 11); that dividends were "reported" to the Comptroller of the Currency and that the Bank Examiner "approved the same" (p. 11). They say that such dividends were never "criticized" by the Comptroller (p. 12); that the Comptroller "placed" the bank in receivership (p. 22), omitting any reference to the fact that *the directors closed the bank and asked the Comptroller to take charge of it* (Ex. V. 1, p. 1); they say that the Bank Examiner "approved" the June, 1930 dividend and that he did not "mention" the September, 1930 dividend (p. 23).

All of these sly suggestions are calculated to lead this court to believe that the "book" statements of the bank were the "true" statements of the bank; and that, because the Comptroller or the Bank Examiner did not make them stop paying dividends, he is in some way responsible for the failure of the bank, and that therefore they are not liable for the assessment which the Comptroller of the Currency subsequently found necessary to levy. The court's attention is directed to the fact, as evidenced by the Bank Examiner's report, that the Comptroller and the Bank Examiner continually called attention to the excessive overdrafts, the illegal loans, the large amount of slow and overdue paper. It is only by ignoring these criticisms, and by considering that all of these criticized loans and overdrafts were worth par, instead of being substantially worthless, that they are

able to show that the bank had any surplus or undivided profits at any time throughout the entire period.

Beginning at p. 7 of our original brief, and running through to p. 23 thereof, we have called the attention of the court to the true condition of the bank during this period. Respondents in their brief do not question these facts. They could not do so, because every fact stated therein about the condition of the National Bank of Kentucky rests upon unquestioned written evidence found right in the records of the bank itself. Instead they seek to base their argument on *book* values as shown in published statements. In criticizing the Comptroller of the Currency, and the Bank Examiner, they forget that the legal responsibility for running a national bank rests upon the stockholders and their agents, the directors. In the period in question the Comptroller of the Currency was much more limited than he is today in his power of supervision. Then he could "criticize" and that is about all that he could do, unless he should make a finding of insolvency and close the bank; a very great responsibility which he should not exercise except when he was absolutely sure of his ground. When the officers of the National Bank of Kentucky assured him that these criticized loans were all right; or that they would in the course of reasonable time be taken care of, he had a right to rely upon their good faith; and give them an opportunity to clean up their bank. A bank should not be closed as long as there is reasonable grounds to believe that it can be saved. And it was the management which induced the Examiners to postpone charge-offs on the promise to clean up the losses by various *in futuro* plans never carried out.

Respondents' Creature, Banco, Does Not Shield Them from Liability.

In contending that the "corporate entity of Banco is a "non-conductor" respondents' brief (pp. 38-52) takes the position that because Banco was a corporation, this court cannot look beyond it; that since the bank shares were the

"property" of Banco and since the respondent shareholders do not have "an interest in its property" therefore no liability attached to the property can be "attributed" to them. If this theory were the law, all the bank-stock holding company cases, cited in our main brief (pp. 45-56) were wrongly decided. This would be putting form before substance, wipe away the rule of "fair play", disregard "standards of common decency and honesty" and make the road wide open to evade numerous statutes by the simple "intervention of a corporate entity" between the *real* owner and the liability. (*Pepper* v. *Litton*, 308 U. S. 295.)

Respondents' brief at p. 48 states that there was no "arrangement by which the conduct of the affairs of Banco could be controlled in any degree by any bank whose shares were held by Banco". No record authority is cited for this statement. We challenge the statement because the record does show affirmatively that it was "essential" that Banco be "managed and operated" by the banks (See Prospectus, bottom of p. 64, our original brief).

At p. 49 it is stated that "Banco derived income from other sources than the bank shares held by it." We challenge this statement by saying that Banco's total income was from bank stocks, except $3457.40 which came to it principally as interest on unpaid stock subscription.

On the same page, 49, respondents say "it was only because of Banco's income from other sources that it was able to declare and pay the dividends which it paid to its stockholders". As pointed out at the bottom of p. 37 of our original brief, Banco received $1,180,858.50 in dividends from its bank stocks, paid $1,253,530.00 in dividends to its stockholders, and made up the deficit by an *overdraft on the National Bank of Kentucky*, which remained in the Bank at the time of its failure.

BancoKentucky was not the type and kind of a corporation referred to in *Klein* v. *Tax Supervisors*, 282 U. S. 19, and in *Puerto Rico* v. *Russell*, 288 U. S. 476, or in *Cannon*

v. *Cudahy*, 267 U. S. 333. BancoKentucky was more like the *Northern Securities Company* v. *U. S.* 193 U. S. 197.

Banco was a corporate scheme of Respondents to do indirectly what they could not do directly. National Bank of Kentucky could not lawfully have a branch bank outside of Louisville. 12 U. S. C. 36. It could not even have one in Louisville, without the Comptroller's permission. 12 U. S. C. 36c. It could not lawfully own stock in another bank. 12 U. S. C. 24. Kentucky law absolutely forbids anyone, corporation or individual, from owning more than 50 per cent of the stock of a Kentucky bank or trust company. Ky. St. 581, 609. Both state and Federal laws prohibited consolidations or mergers of banks except under careful statutory supervision. 12 U. S. C. 34a; Ky. St. 555. Loan limits were rigidly fixed. 12 U. S. C. 84; Ky St. 583. Interlocking directors were prohibited. 15 U. S. C. 19; 12 U. S. C. 462. Bank directors were required to own outright and unincumbered stock of the par value of $1,000.00; in a little bank $500.00. 12 U. S. C. 72, 73. Foreign corporations were required to qualify in Kentucky. Ky. St. 571, 4189-1. The Banco scheme was a planned attempt to circumvent at least some of these salutary statutes, in addition to the assessment statute. 12 U. S. C. 63, 64. We so charged in the bill of complaint. (R. 1, p. 66.)

The record shows that it was an "essential part" of the scheme that Banco "be managed and operated" by the banks. (Ex. V. 3, p. 1139.) The scheme also provided that Banco would "exercise many profitable and important functions which neither a bank or trust company has authority to exercise." So, therefore, it was planned from the beginning that the two banks should use Banco as an instrumentality to do indirectly what they could not do directly.

And this is exactly what the banks did, using their creature BancoKentucky as the instrumentality. They bought a chain of banks in Ohio and Kentucky. National Bank of Kentucky through its President directed the operation of each of these banks which were nothing but

branches or links in the chain of banks. The scheme was a direct and immediate violation of the Kentucky Anti-Monopoly Bank Act in that Banco held more than 50 per cent of Louisville Trust, Central Savings, First National of Paducah, Ashland National, Security, and Mechanics. See p. 28, our original brief. Ky St. 581, 609. Brown, President of National Bank of Kentucky, served as a director of every one of the chain of banks, a violation of the interlocking director statute. 15 U. S. C. 19; 12 U. S. C. 462. Banco never did qualify to do business in Kentucky. It never paid its foreign corporation license tax. It never filed its foreign corporation reports. It was an "outlaw" corporation so far as the State of Kentucky was concerned. Ky. St. 571, 4189-1, Ex. 69b.

In the light of the above we submit that BancoKentucky Company, instead of being as they claim a "nonconductor", is exactly the type of corporation that a court of equity will look through or disregard in order to protect the innocent depositors of the bank. Certainly a court of equity will not permit the respondents, creators of Banco, to use it as a shield to protect them from the statutory individual liability.

In March, 1927 a letter was addressed to the Comptroller of the Currency (Ex. 11-1, p. 154, V. 1) advising that it was in contemplation to consolidate the National Bank of Kentucky and the Louisville Trust Company. The Comptroller of the Currency wrote back promptly on March 22, 1927 (Ex. 11-2, p. 155, V. 1) in which he stated:

> "If the Louisville Trust Company desires to consolidate with the National Bank of Kentucky of Louisville as proposed the consolidation can be effected under the Act of February 25, 1927. You are advised, however, that under the rules of this office it will be necessary for an examination to be made of the trust company prior to approval of the proposed consolidation."

The respondent bank stockholders did not want the Louisville Trust Company examined by the National Banking

Department. They were already having too much trouble with the examinations of the National Bank of Kentucky. When they found out, as they did by this letter, that they could not consolidate Louisville Trust and the National Bank of Kentucky without a Comptroller's examination they undertook to do indirectly what they could not do directly. They "unified" the two banks by putting the stocks of both in the hands of trustees and issued to the stockholders the so-called Trustees Participation Certificates, which were nothing but bank stock.

Two years later, when it became obvious that the unification of the two banks did not restore them to public confidence they started BancoKentucky. By this time a 38 per cent deposit withdrawal, plus continued and more persistent criticism of overdrafts, excessive and slow loans, made it obvious that the National Bank of Kentucky was in a precarious condition; that its ultimate failure was in the offing, unless something substantial was immediately done. So Banco was proposed to escape the charge-offs which the Bank Examiner demanded and which, if made, would have wiped out surplus and undivided and part, if not all, of the capital.

Just about this time somebody thought of the double liability. So when they fixed up the papers they cleverly, so they thought, undertook to do two inconsistent things. They wanted to keep the exchange from being a legal sale so that they would not have to pay income tax. At the same time they wanted to call it a sale so that they could escape the assessment liability.

They were very careful and deliberate as to both schemes. It all appears crystal clear upon an examination of the testimony of their lawyer-witness, Robert F. Vaughn. He said at R. 3, p. 14, that every stockholder of the National Bank of Kentucky who purchased his bank stock at par would have had a taxable gain of $700.00 per share "if it was an outright sale." He said at p. 15 that if they would carry out the transaction as he proposed "it would be a

mere receipt of the same property in another form". He said at p. 16 that "it was just an exchange of one kind of paper for another kind of paper". He said, at the top of p. 17:

> **"The same identical people were in control of both the bank stock and the new corporation before Banco and after Banco."**

He said at the middle of p. 18 that "this thing was not done hurriedly", and that "it was done deliberately". He said at p. 22 that the National Bank of Kentucky "was at the very outset under criticism of the National Bank Examiner" and at p. 28, "of course, everybody knew the Wagon Works was a sore spot in all of the banks". He said, at p. 32, that the objective of BancoKentucky was "the acquisition of a large group of banks". At p. 33 he said that he subscribed for some Banco stock himself and "I borrowed the money to pay for these subscriptions from the National Bank of Kentucky". He said, at p. 35, "*for all practical purposes the owners of the Trustees Participation Certificates were the owners of the bank stock. And the owners of the bank stock, these two banks, had legal control of the BancoKentucky Company*".

In the Detroit Bankers case the distinguished Detroit lawyer who wrote the papers in that matter, said that the holding company stock was "bank stock pure and simple". It is submitted that Mr. Vaughn's testimony makes it equally clear that BancoKentucky stock was also "bank stock pure and simple".

BARBOUR v. THOMAS.

86 F. (2d) 510.

Respondents' brief at p. 8 refers to the fact that we failed to convince the lower court of the "similarity" between the case at bar and the decision in the Detroit Bank stock holding company case, *Barbour* v. *Thomas*. Beginning at p. 43 of their brief they undertake to distinguish between

the Detroit case and the case at bar. We adhere to our contention that the facts in the two cases are substantially identical. We invite careful comparison of the two cases. We respectfully submit that the asserted difference in the facts is immaterial; and that the decision in the Detroit case should have controlled the Louisville case.

Respondents' brief at p. 45 refers to Judge Hicks' "careful and detailed analysis of the extraordinary nature" of one of the Detroit Bank stock holding companies, namely: Detroit Bankers. They say: "It was, indeed, a *bankers company*". What was BancoKentucky but a "*bankers*" company? The name "BancoKentucky" indicates of itself that it *was* a "bankers" company. It is not a coincidence that holding company names such as Bank America Company, Northwest Bancorporation, BancOhio, Detroit Bankers, and Guardian Detroit Union Group, Inc., indicate that the corporations are primarily engaged in holding the shares of banks. Is it not more than a coincidence that such holding companies in adopting a name selected one practically synonomous not only with the banking business but quite similar to the principal bank in the chain? Guardian Detroit Union Group, Inc. took its name from the Guardian Detroit Bank and the Union Guardian Trust Company, the two big links in its chain. Bank America Corporation carries the name of its cornerstone bank. BancOhio is built around the Ohio National. Northwest Bancorporation takes its name from the territory in which it operates. The name "Detroit Bankers Company" was less closely associated with the name of its principal bank, First National Bank-Detroit, than any of the group mentioned. BancoKentucky was directly named after the National Bank of Kentucky, which was always known as Bank of Kentucky. As stated in our original brief, BancoKentucky was listed and sold on the stock markets and publicized in the newspaper quotations as a bank stock. Therefore we submit that the argument fails in its attempt to show that Detroit Bankers was and that Banco was not "a bankers company".

On the same page of respondents' brief it is stated with reference to Detroit Bankers that

> "It was, essentially and exclusively, an instrumentality of the five constituent banks, by which it was conceived, organized, financed, dominated and ultimately dissolved."

This statement quoted above is correct as to Detroit Bankers but it is equally correct as to BancoKentucky. The only distinction is that in the Detroit Bankers there were five banks at the time of its organization and in BancoKentucky there were only two banks, National Bank and Louisville Trust. BancoKentucky was "essentially and exclusively an instrumentality" of the two banks. In fact the Banco prospectus used the very word "essential," viz.:

> "It is an *essential* part of this organization that the shares of this corporation (or at least a substantial majority thereof) be owned by the trustees participation shareholders, and that it *be managed and operated by the Board of Directors and the officers of the two banks.*"

BancoKentucky was "*conceived*" by the two banks. The conception took place in meetings of the Board of Directors of National Bank of Kentucky held on June 7 and June 21, 1929, a record of which appears on the bank minutes (See minutes and resolutions printed in full at p. 23 of our original brief). Banco was "organized" by the two banks. See the prospectus printed as Appendix A, p. 63 of our original brief. Note at p. 66 the signatures of the two banks and at p. 67 the signatures of the directors. And bear in mind that the directors of the two banks were identical and that after Banco was formed the same directors also became the directors of Banco.

Banco was "*financed*" by the two banks because over $7,000,000 out of the $9,000,000 new money put into Banco came out of the two banks by way of loans upon the security of Banco stock (Ex. V. 4, p. 1934).

Banco was *"dominated"* by the two banks because it was "an essential part" of the scheme "that it be managed and operated by the Boards of Directors and the officers of the two banks."

And finally Banco was *"ultimately dissolved"* by the two banks because when the Banco Board, which was identical with the Board of Directors of the National Bank and Louisville Trust Company voted to suspend they brought the whole structure down like a house of cards, including Banco and the whole chain of constituent banks. This is exactly what took place at Detroit with the Detroit Bankers and the Guardian Group chains; exactly what Solicitor General Lehmann prophesied would happen so far back as forty years ago.[1]

Respondents also, at p. 45, say that Detroit Bankers was in "absolute control" of the constituent banks for five years. BancoKentucky, according to the "essential" plans, was always to be "managed and operated" by the two banks. At p. 46 it is pointed out that Detroit Bankers operated through "service charges" on the constituent banks. BancoKentucky operated on overdrafts at the National Bank of Kentucky and by *using, without remuneration, the facilities and clerical force of the National Bank.* It did this because it had no facilities or clerical force of its own. At p. 46 respondents suggest that Detroit Bankers was controlled through "puppets" of the banks. National Bank of Kentucky and Louisville Trust Company controlled Banco directly without the aid of "puppets"; a distinction without difference.

There is but one significant and pertinent distinction between the two cases on the record. The stockholders of the Detroit Banks honorably obligated themselves by contract to respond for any assessment levied upon any of the constituent banks. The Louisville stockholders by seeking to make their stock "non-assessable" and by writing into their Articles of Incorporation that their private prop-

---

[1] Congressional Record, Vol. 75, Part 9, pp. 9899-9904.

erty should be exempt from liability, were seeking to escape the very responsibility which the Detroit stockholders honorably assumed.

To permit the respondent stockholders of a tottering bank, without knowledge or sanction of the depositors to interpose their own corporate creature, Banco, between themselves and the double liability would be a direct violation of the "rules of fair play" pointed out in *Pepper* v. *Litton*, 308 U. S. 295, at p. 311. Certainly the stockholders of a failing national bank cannot "avail" themselves of their own "corporate device" to the "detriment" of the innocent depositors; and this must be particularly true when they seek the evasion or circumvention of a statute passed for the security of the depositors. The "rules of fair play" do not permit them to do "indirectly through the corporation" what they could not do "directly" as individuals. No matter how "meticulous" they may be in following legal forms or "technical requirements" in such cases, equity will "intervene" to keep them from getting away with it, because it is not "fair play."

It is claimed as a distinction between the Barbour v. Thomas and the case at bar that no "new money" went into Detroit Bankers but that over $9,000,000 "new money" went into BancoKentucky. We challenge the statement that "new money" went into BancoKentucky. Over $7,000,000 of it came out of the two banks on loans made on the security of Banco stock. We don't think this was "new money." In any event in the companion Detroit case to Barbour v. Thomas, *Deming* v. *Schram* (7 F. Supp. 271), $7,500,000 of really new money went into that bank stock holding company and the court made no distinction in its judgment. In *Nettles* v. *Rhett* (94 F. (2d) 42), new money was put in the holding company and its stockholders were held liable.

It is claimed, and the Court of Appeals opinion (*Anderson* v. *Abbott*, 127 F. (2d) 696, p. 700) also points this out as a distinction between Detroit Bankers and BancoKentucky, that none of the stock of Detroit Bankers was

sold to the public. This statement is not exactly correct. Detroit Bankers stock was listed and actively dealt in on the Detroit Exchange and many of the defendants in that case purchased their stock in the open market. It is true, however, that none of the stock of Detroit Bankers was originally offered to the public whereas in Banco the public buyers were to some extent original subscribers. But what difference does all this make anyway? If Banco-Kentucky stock represents bank stock, and we submit that it does under the facts of this case, the holder of Banco stock becomes, for the purpose of the statute in question here, liable for the assessment regardless of whether he acquired it by exchange or by purchase in the market. The district court so found (R. 1, p. 155). See also *Ullrich* v. *Thomas* (86 F. (2d) 678). (Cert. den. 301 U. S. 692.) When the investor bought Banco stock he knew he was buying bank stock; not stock in one bank but stock in every one of the whole BancoKentucky chain of banks. He must have known this because Banco was listed on the exchanges and quoted in the newspapers always as bank stock. Even if the contention was sound it would still result in holding the original bank shareholders. Certainly *they* could not escape liability because a few people on the outside bought Banco stock.

The lower court in its attempt to distinguish the *Barbour* v. *Thomas* case, p. 700, recites that the only assets of Detroit Bankers was bank stock and that the expense of Detroit Bankers was borne by the levy of a service charge on the various banks, and it is pointed out that therefore there was no substantial assets for the protection of the bank depositors with reference to the assessment statute and then intimates that Banco had substantial assets other than bank stocks. In answer to this statement we refer the court to our original brief, pp. 27 to 31 inclusive, where it is definitely shown that all the assets that Banco ever had were bank shares except a few shares in the Union Central Life Insurance Company and where it is shown that all the business that Banco ever transacted was connected with its

business of holding bank stocks. It never had investments in anything except bank stock.

Another distinction that the lower court pointed out between the two cases was that in the Detroit case the stockholders assumed double liability by their Article 9 whereas in Banco they not only made no such assumption but also affirmatively sought to negative liability by making their shares "non-assessable." It is submitted that an attempt to evade the statute violates the rule of fair play which estops the one who makes the attempt from taking advantage of it. Again the lower court at p. 701 attempts to distinguish the two cases by saying that Banco operated on a broader scope, both territorially and in corporate financing than did the holding company involved in Barbour v. Thomas. As to this suggested difference we point out that the only territorial difference was that Detroit Bankers operated only in Michigan while BancoKentucky operated in Kentucky and Ohio. The only difference "in corporate financing" outside of the holding of bank stocks was that Banco owned a few shares of life insurance company stock. The "loan" to Brown and the other "operations" are all set forth at pp. 30 and 31 of our original brief. Examination of these will show that except for the fact that it owned banks in two States Banco operated on a much narrower field than Detroit Bankers because Detroit Bankers owned controlling stock in many more banks than did BancoKentucky.

In our original brief, pp. 56 to 61, inclusive, we have analyzed and criticized in detail both the District Court and Court of Appeals opinions in the instant case. A further analysis of the Court of Appeals opinion is found in the petition for rehearing (R. 3, p. 327).

NO DEFENSE CAN BE BASED ON PRIOR CASES.

Less than twenty-four pages of the "argument" for respondents is devoted to the merits (pp. 33-57). More than half of respondents' 109-page brief is devoted to the claim that two prior cases enable the shareholders of this bank to

escape the payment of their statutory liability on the ground that such cases represent "an election of remedies", or are "res judicata". The first of these two cases was a suit by the Receiver to recover judgment against the holding company as the *record owner* of the bank stock. This case is known as "*Laurent* (Receiver of Banco) v. *Anderson*" (Receiver of the Bank), 70 F. (2d) 819. The second case was a suit by the Receiver to impose liability upon the directors of the Bank for losses resulting from violation of their statutory duty and from negligence in the management of the Bank. This case is known as "*Atherton* v. *Anderson*", 86 F. (2d) 518; 99 F. (2d) 883. These defenses were held to be without merit in fact and unsound in law by the District Court in his opinion overruling defendants' motion to dismiss, reported in 23 F. Supp. 265 (R. 1, p. 144). A similar conclusion was reached by Judge Sullivan in overruling a motion to dismiss the bill of complaint filed in the Northern District of Illinois. *Anderson* v. *Atkinson* (22 F. Supp. 853). Upon the conclusion of the trial on the merits the District Judge adhered to his opinion that these technical defenses based on these two cases were devoid of merit (R. 1, p. 268)[1] and denied respondents' request for findings and conclusions of law upholding these defenses (R. 1, p. 283).

The respondents did not appeal from the decision of the District Court overruling the defenses based upon these two cases. Although these defenses were asserted in the Court of Appeals by way of argument, they were not considered meritorious by that court. We do not believe they are deserving of consideration here. However, in order that this court may have the benefit of a clear and correct statement of the issues involved, we discuss each separately.

---

[1] Conclusion of Law No. 13: "The judgment in *Atherton* v. *Anderson*, 86 F. 2nd 518, is not res judicata of the case and the defendant's pleas of res judicata, election, estoppel and estoppel by judgment should be overruled.

LAURENT v. ANDERSON.

70 F. (2d) 819.

As set forth in our main brief (p. 3), substantially all the stock of the National Bank of Kentucky at the time of its failure was held of record in the name of Banco. The failure of Banco and the banks held by it followed immediately the failure of the Bank. This was inevitable since a chain is no stronger than its weakest link and this is particularly true of bank chains—which rest on public confidence.

As soon as the assessment was levied upon the stock of the National Bank of Kentucky the Receiver was confronted with the duty to proceed to collect the assessment against both the record owner of the bank stock and against the real shareholders of the Bank insofar as he was unable to make the assessment against the record holders. Respondents argue that Banco was not a record holder of bank stock because the stock register listed the shareholders as the directors and the six trustees. The argument is fallacious. The exact language on the stock ledger recorded that the stock of the Bank stood in the names of the six trustees,

> "*under trust agreement dated April 22, 1927.*" (R. 2, p. 77)

This trust agreement, thus incorporated by reference in the stock ledger, was actually filed with the Bank as provided in the participation certificates issued by the trustees (Ex. V(1, p. 28).

Furthermore, the trustees were required by the trust agreement to keep,

> "* * * *a register of trustees participation certificates issued by them similar to the ordinary stock certificate book,* showing the name and mailing address of each certificate holder, and *shall certify a copy thereof to each institution* (National Bank of Kentucky and Louisville Trust Company) issuing stock to them." (Trust Agreement paragraph VI.) (Ex. 7, Vol. 1, p. 25.)

The above provision under which a register of the holders of trustees participation certificates was certified to and made part of the records of the Bank was in compliance with R. S. § 5210, 12 U. S. C. § 62.

It is thus clear that the stock *records* of the National Bank of Kentucky showed, first, that all of its stock was issued to the trustees under the trust agreement of April 22, 1927 and, second, that BancoKentucky Company was the record holder of 95 per cent of the trust certificates which represented the shares of the Bank. Disregarding mechanics, the Bank records showed clearly that the BancoKentucky Company held 95 per cent of the stock of the Bank.

However, since BancoKentucky Company was a holding company, conceived and organized by the Bank shareholders to hold their bank stock, the Receiver served by registered mail two separate and different notices of assessment and demand for payment—one on BancoKentucky Company as the *record* holder of bank stock, and the other on the shareholders of Banco as the true, real and beneficial holders of the bank stock. These two notices show that the position taken by the Comptroller of the Currency and the Receiver of the Bank has been continuously consistent from the day the assessment was levied to the present time. The first notice was directed to Mr. Joseph S. Laurent as Receiver of BancoKentucky Company and was dated March 20, 1931. After reciting that the Comptroller had levied an assessment upon the stockholders of the Bank for the par value of each share, the notice continued:

> "You are *holder of record* of 540,484 trustees' participation certificates issued under the terms of a certain trust agreement of April 22, 1927, which said trustees' participation certificates represent the ownership of 37,721,624 shares of stock of The National Bank of Kentucky. You are, therefore, required to pay the assessment upon 37,721,624 shares of stock of The National Bank of Kentucky, represented by the aforesaid trustees' participation certificates in accordance with the foregoing order and this notice. Your prompt compliance will be a great benefit to creditors of this trust and will advance materially its early liquidation.

Notice to Banco

A second notice was sent out on the same day, also by registered mail, to each stockholder of BancoKentucky Company advising him of the levy of the assessment and then reciting:

> "A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. *You will, therefore, take notice that it is the intention of the undersigned*, as Receiver of The National Bank of Kentucky, *to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.*" (Ex. 1, p. 7; R. 1, pp. 69, 70.)

No objection was made by any shareholder of Banco to the above clearly defined course of procedure. Since the attempt to collect as much as possible from the holding company before resorting to the individual liability of shareholders was for their benefit, there was no reason the shareholders of Banco should not acquiesce in the course followed by the Receiver.

Pursuant to the foregoing notices and reservation of his right to collect any deficiency from the individual shareholders of Banco the Receiver commenced the action known as *Laurent* v. *Anderson* to collect the stock assessment from Banco as the record holder. This clearly appears from an examination of the petition filed October 31, 1931. After describing the plaintiff, defendant and the nature of the suit, the petition recites:

> The Banco Kentucky Company was at the time of the closing of The National Bank of Kentucky, and the appointment of the plaintiff as Receiver, *the holder of*

record of five hundred forty thousand four hundred eighty-four (540,484) Trustees Participation Certificates, having a par value of $10.00, which Trustees Participation Certificates were issued under the terms of a certain Trust Agreement of April 22, 1927, and *which Trustees Participation Certificates represent the ownership of 37,721.624 shares of stock of The National Bank of Kentucky of Louisville*, as hereinafter more fully set forth.

(Deft. Ex. 23 Transcript of Record *Laurent* v. *Anderson*, p. 3)

Other language of the petition clearly shows that two issues were raised by the petition. First, that trustees' participation certificates represented the ownership of bank stock under the trust agreement and, second, that Banco was the record owner of such stock and hence liable as record owner and on its contract (Art. IX of the Trust Agreement) to pay the assessment. These claims were challenged by a general demurrer and answer filed by the Receiver of Banco. The answer contains a denial that,

> "* * * the said BancoKentucky Company owned any stock of the National Bank of Kentucky at any time, or that any trustees' participation certificates owned by BancoKentucky Company at any time represented National Bank of Kentucky stock."

(Deft. Ex. 23 p. 10)

Banco further asserted in paragraph two of its Answer that the *record shareholders were the trustees* and that they alone were liable to the extent of the trust estate under 12 U. S. C. 66 of the federal banking law.

Thus, the main issue presented to the court for decision under the pleadings in *Laurent* v. *Anderson* was whether Banco or the trustees were the *record* owner of the bank stock. The respondents, stockholders of Banco, were not parties to that case. No facts were offered in evidence as to respondents. *The court did not decide that respondents were, or were not, bank stockholders, record, or real.* Such an issue was not before the court to decide. So when the

court, in its opinion, speaks of the "real and beneficial" ownership theory of liability it was only with reference to the rights and responsibilities as between Banco and the trustees. Banco, in that case, as between it and the trustees, was both the real and the record owner of the bank stock. It was, so far as the record was concerned, the *real* stockholder because it was the beneficiary under the trust indenture. It was the *record* stockholder because its name was filed of record with the bank by the trustees under the provisions of the Bank Act. 12 U. S. C. 62.

An incidental question which arose under 12 U. S. C. § 66, was whether liability rested solely on the trustee to the extent of the trust estate or whether the beneficiaries of the bank stock trust were liable. The court held that the stock assessment liability rested upon the BancoKentucky Company as the beneficiary of the trust and the record holder of the bank stock.

Of the judgment thus obtained against Banco, as the record owner of the stock, a little more than ninety thousand dollars was collected, leaving a deficiency of nearly four million dollars. Acting pursuant to the notice previously given to shareholders of BancoKentucky Company (supra, p. 24), the Receiver then brought the present suit to recover from each his proportion of the deficiency amounting to approximately $2.30 per share. It is now claimed that the abortive attempt to realize the assessment from the defunct holding company was an election of remedies by the Receiver which bars the right of the depositors to pursue the real shareholders in the present case.

It is further claimed that the decision constitutes an adjudication that the corporate entity of Banco was the real shareholder of the National Bank of Kentucky. Neither claim is well founded in law.

Both the Record and Beneficial Holders of Bank Stock Are Liable.

From the outset the Comptroller of the Currency and the receiver considered both the holding company and its shareholders liable for the assessment. In this they are amply supported by the authorities. In the cases which have considered the liability of a holding company and its shareholders for the statutory assessment upon the stock of banks owned by the holding company, *both* have been held answerable. E. g., *Metropolitan Holding Company* v. *Snyder,* 79 F. (2d) 263 (C. C. A. 8, 1935); *Corker* v. *Soper,* 53 F. (2d) 190 (C. C. A. 5, 1931), cert. denied, 285 U. S. 540 (1932); *Harris Investment Co.* v. *Hood*, 123 Fla. 598, 167 So. 25 (1936); *Nettles* v. *Sottile,* 184 S. C. 1, 191 S. E. 796 (1937); *Nettles* v. *Rhett,* 94 F. (2d) 42 (C. C. A. 4, 1938); *Flanagan* v. *Madison Square State Bank,* 302 Ill. App. 468, 24 N. E. (2d) 202 (1939); *Galinski* v. *Adler,* 302 Ill. App. 474, 24 N. E. (2d) 205 (1939).

Respondents' argument is predicated on their failure to recognize that both the holding company and its shareholders are liable and that the liability is not in the alternative. Where both are liable suit and judgment against one, in the absence of satisfaction, does not affect the right to proceed against the other. Respondents' whole contention is well answered in *Ericson* v. *Slomer,* 94 Fed. (2d) 437 (C. C. A. 7, 1938):

> "It is our conclusion that the receiver of a national bank has a right to proceed against both the record and actual owner of the shares of stock in an attempt to collect the liability thereupon imposed. It seems both logical and reasonable that such procedure should be permissible. Under well-established law, both are liable. As to who shall carry the burden as between them is a matter with which we are not here concerned. Why should the receiver, at his peril, be required to select the one against whom he is to proceed and why should a proceeding against one be a bar to a proceeding against the other? He should not be so

required and neither should either of the parties whom the law makes liable be permitted to shield himself from such liability by asserting an unsatisfied judgment has been obtained against the other. To hold otherwise is to lay down the bars so that fraud may be committed upon the creditors of the bank. There can be required only one satisfaction of the stock liability. A judgment against either and a satisfaction, of course, would constitute a bar to a judgment against the other. A partial satisfaction would constitute a bar pro tanto." [94 Fed. (2d) 437, 441.]

Another case directly in point is *Nettles* v. *Sottile*, 184 S. C. 1, 191 S. E. 796 (1937). The receiver of the Peoples State Bank of South Carolina brought an action to collect the stock assessment against the Palmetto Brokerage Company, a holding company which appeared as the holder of 900 shares of the bank stock. After obtaining judgment against the holding company the bank receiver brought suit against its stockholders. The stockholders defended on the ground that the receiver had obtained judgment against the holding company and that such action constituted a recognition of the corporation as the true owner of the shares involved; and that:

"(2) The right of action to enforce the liability attaching to the shares involved is single and cannot be split into separate suits against the corporation and its stockholders; (3) In the *Biltrite* case the depositor-plaintiffs had the option of asserting the liability against the corporation or its stockholders, and elected to seek and recover judgment against the corporation."

The court rejected these defenses, which are identical to those urged by the Respondents here, saying:

"The judgment was against the corporation as the apparent owner of the shares herein involved. The purpose of the instant suit is to discover the true owners of these shares and to collect the liability thereto attaching. . . ."

"Equity, in good conscience, will not countenance the use of the equitable defense of estoppel to further a wrong or work an injustice.

"The principle of equitable estoppel is based solely on the prejudice or injury to the one in whose behalf it is allowed because of the conduct of another. Defendants can show no prejudice to their rights nor injury to themselves in this case which would warrant the application of this principle.

"What has been said above applies with equal force to the defendants' claim of election of remedies. *There has been no election. None was necessary.* The primary right of the depositor-plaintiffs in the *Biltrite* case to enforce and collect the liability attaching to these 900 shares of stock is only being furthered by this proceeding under the authority of the court in the main action, to which this suit, as above shown, is supplementary or auxiliary.

"The depositors are the creditors and the true holders of these shares, the debtors. *As creditors, the depositors have a right to pursue one or more remedies until the obligation is satisfied.*

"The courts favor creditors and the payment of obligations, and they will not loosely interpose barriers in the way of collection of just debts. *The pursuit of several remedies is fully recognized, though, of course there can be but one satisfaction.*" (191 S. E. 796, 798-9.)

The Supreme Court of South Carolina affirmed the lower court on this point:

". . . the court is satisfied with the conclusion that the plaintiff had the right to bring this action, and that he is not debarred from maintaining it by reason of having made an election of remedies." (191 S. E. 796, 808.)

In *Nettles* v. *Rhett*, 94 F. (2d) 42, 44, the stockholders of The Peoples Investment Corporation, a bank stock holding company, argued that a prior judgment for stock assessment obtained against the holding company constituted an election of remedies and barred a subsequent action

against them. The Court of Appeals rejected the argument, expressly approved the decision of the Supreme Court of South Carolina in *Nettles* v. *Sottile, supra,* and said:

> "This ruling in our opinion should be followed in the pending case. There was no election of an inconsistent remedy in the earlier suit."

A similar conclusion was reached in *Continental National Bank* v. *O'Neil,* 82 F. (2d) 650 (C. C. A.-7, 1936). In that case the court said that they could well understand the receiver's perplexity and that his course in suing both the record owner and the beneficial owner was "reconciliably consistent."

> "In both actions the true facts were stated, and the complexity arose because of the legal conception of division of ownership into legal and equitable."

Recently this court denied certiorari in the case of *Reconstruction Finance Corp.* v. *Pelts,* 123 F. (2d) 503 (C. C. A. 7, 1941) cert. den. 315 U. S. 812, where the court of appeals arrived at the conclusion that judgment against the record owner of bank stock did not prevent the receiver from proceeding against the real owner.

In another recent decision the Seventh Circuit Court of Appeals has reaffirmed the doctrine that a judgment recovered against the record holder of bank stock for assessment liability does not bar a subsequent action to determine the real shareholder. *Reconstruction Finance Corp.* v. *Barrett,* 131 F. (2d) 745 (1942). In that case judgment was obtained against the record holder (Sundeen) who paid a small part of the judgment by way of compromise. It was claimed that this constituted a complete bar to recovery against one Barrett whom the court found to be the real owner of the shares registered in the name of Sundeen. In overruling this plea Judge Minton, speaking for the Court, said:

"We held in Ericson v. Slomer, 7 Cir., 94 F. 2d. 437, and in Reconstruction Finance Corporation v. Pelts, 7 Cir., 123 F. 2d. 503, that judgment for the added stockholders' liability could be had against both the owner of record and the actual owner, but that there could be only one satisfaction. By that we meant there could be only one satisfaction of the liability evidenced by the amount in judgment. * * *

The satisfaction in the case at bar was only a pro tanto satisfaction.

The owner of record is liable because he is the owner of record and he will not be heard to deny his liability. The actual owner, though not of record, is liable because of the voluntary relationship he has assumed towards the stock as owner in fact. * * *

When the obligation to pay has been fully met, that is all the judgment creditor is entitled to, and until it has received that full satisfaction, it may pursue either or both of its judgment debtors. In seeking to collect the double liability of the stockholders, the plaintiff is trying to collect the whole of the established liability. *It is not engaged in a mere game of recovering judgments. It is engaged in collecting money, not judgments.*"

To the same effect is *Broderick* v. *Aaron,* 151 Misc. 516; 272 N. Y. S. 219; aff. 242 App. Div. 604, 272 N. Y. S. 244, and 277 N. Y. S. 499:

"Nor is it necessary in an action of this character for plaintiff to elect between the liability of the agent or principal. This doctrine applies only where the decision to pursue the principal is inconsistent with a concurrent cause of action against the agent and usually operates where contractual obligations are involved. *Georgi* v. *Texas Co.*, 225 N. Y. 410, 122 N. E. 238. Compare *Phelps* v. *Wait,* 30 N. Y. 78. The assessment liability is not contractual in the accepted legal sense of the term [*Rogers* v. *Jarden* (D. C.), 3 F. Supp. 211], but it is of statutory origin (*Christopher* v. *Norvell,* 201 U. S. 216, 26 S. Ct. 502, 50 L. ed. 732; 5 Ann. Cas. 740; *McClaine* v. *Rankin,* 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500). A fixed and absolute liability is imposed by statute upon designated

classes and categories of persons." [272 N. Y. S. 219, 236-7.]

See also *Irvine* v. *Blackburn*, 205 Fed. 217 (C. C. A. 3, 1913), certiorari denied 229 U. S. 622 (1913).

Respondents cite cases dealing with the general principle of election of remedies. These cases do not consider the situation of the receiver of an insolvent national bank seeking to recover an assessment for the benefit of depositors from a bank stock holding company and its shareholders. There is no inconsistency in his proceedings against both. All of respondents' cases have to do with situations where one or the other of two could be sued, but not both. The inapplicability of such decisions is evident. The only case involving stock assessment cited by respondents is *Pottorff* v. *Dean*, 77 F. (2d) 893 (C. C. A. 1, 1935). This case does not involve the liability of a holding company and its shareholders.

There the defendant Dean owned bank shares. She transferred the bank shares to trustees and divested herself of all interest therein. The receiver attempted to collect the assessment from the trustees. Subsequently he brought suit against defendant Dean. The court held that Dean had not been a stockholder in the bank for more than five years and that the receiver's suit against Dean was inconsistent with his prior action against the trustees. In the suit against the trustees the receiver recognized that Dean retained no interest in the assets transferred to the trust.

How different is the situation here. At the outset the Receiver served notice on the stockholders of Banco that he considered them the real shareholders of the Bank within the meaning of the assessment statutes, and he has never receded from that position. Unlike the situation in the Dean case, both Banco, as the record holder, and the stockholders of the holding company, as the real shareholders, must answer for the assessment. In all the Bank Stock holding company cases both the company and its shareholders have

been held liable for the assessment. In none has it been held that an unsatisfied and uncollectible judgment against the holding company bars the receiver from enforcing the assessment against the individual shareholders.

Laurent v. Anderson Is Not Res Judicata of the Issues Here Nor Was There an Election.

Respondents argue that the Laurent case decided that the real owner of the stock was the corporate entity, BancoKentucky Company. They further argue that this negatives ownership by the stockholders because the holders of stock of a bona fide corporation are not the owners of the assets thereof. Respondents further say that, *although they were not parties to Laurent* v. *Anderson*, they were in privity with the corporation.

There are many difficulties with defendants' argument. Primarily, it starts with a false premise. In determining whether the doctrine of estoppel by judgment or res judicata is applicable, the courts have held that the issues of law and fact and the parties must be the same. The pleadings control the issues. We have previously pointed out that the pleadings in the Laurent case raised entirely different issues from those involved in the present suit, and the parties were entirely different. The transcript of the record in the Laurent case, including all the formal appeal papers, consists of *less than fifty printed pages*. The case was largely determined by a construction of the trust agreement and the principal question was whether the trustees' participation certificates were bank stock, a matter which is no longer questioned. In the Court of Appeals the respondents in their brief, at page 40, said:

> "The trustees' participation certificates are admittedly bank stock for the purpose of this case."

Defendants refer to certain language in the opinion and findings in *Laurent* v. *Anderson* and in the argument contained in some of the briefs to the effect that Banco was the

real and beneficial owner of the trustees' participation certificates, which were held to be bank stock, but, as this court has warned:

> "The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. . . ." *Vicksburg* v. *Henson*, 231 U. S. 259, 273 (1913).

Here, as in *United Shoe Mach. Co.* v. *United States*, 258 U. S. 451, 460 (1922), "the defendants in their argument seize upon isolated passages in the opinion of the court in the former case, and contend that they are decisive here." But here, as in that case "the effect of the former judgment as an estoppel is not to be thus determined" (ibid.).[1] Judge Hahn's language cannot be considered apart from the other language in the opinion above referred to, nor apart from the pleadings and the issue presented in the case, i.e., whether T.-P. C.'s were Bank stock. *The court had for determination whether beneficial interest in the trust evidenced by the T. P. C.'s enabled Banco to shift liability as record owner of the T. P. C.'s to the trust estate under the provisions of R. S. § 5152, 12 U. S. C. § 66. None of the defendants was a party to that case and the court did not decide or purport to decide whether the stockholders of* ***Banco are the real and beneficial owners of the Bank's stock.***

That a reading of Judge Hahn's entire opinion leaves no question about what was decided in the *Laurent* case is demonstrated by what Judge Sullivan said when he rejectd similar pleas of estoppel by judgment, *res judicata* and *stare decisis* in the action brought by the receiver in the Il-

[1] Again in *Oklahoma* v. *Texas*, 272 U. S. 21, 42 (1926), the Supreme Court admonished: "The effect of a decree as an adjudication conclusive upon the parties, *is not to be determined by isolated passages in the opinion* considering the rights of the parties, *but upon an examination of the issues made and intended to be submitted, and which it was intended to decide.*"

linois district court. As to these defenses, Judge Sullivan said in part:

> "Defendants urge that because the receiver of the bank originally brought a suit against the Banco-Kentucky Company, the holding company, for double assessment, on the ground that it was the *record owner* of the bank stock (*Laurent* v. *Anderson, Receiver*, 6 Cir., 70 F. 2d 819, 823), recovered judgment against the holding company, and collected approximately $90,000, he is now estopped from seeking to disregard the corporate entity of the holding company and enforcing the assessment against the present defendants as the actual and beneficial owners of the stock.
>
> "I agree, however, with plaintiff's contention that the issue in the present case on the liability of the individual stockholders of the holding company was not raised or considered in the *Laurent* case, supra. The question there before the court was the liability of the Banco-Kentucky Company; and the court held that it, the Banco-Kentucky Company, was liable, first, because of its agreement to pay the double assessment; and, secondly, because it was the record owner of the bank stock.
>
> "In my opinion the judgment against the Banco-Kentucky Company does not constitute *res adjudicata*, neither does it constitute estoppel against the plaintiff in the instant case, so as to prevent him from maintaining a suit against the real and beneficial owners of the bank stock." *Anderson* v. *Atkinson*, 22 F. Supp. 853, 860 (D. C. Ill., 1938).

On motions to dismiss, Judge Swinford also rejected these defenses stating: "In the case of *Laurent* v. *Anderson*, supra, the same matters were not directly in question. * * * I am of the opinion that res judicata is not a good defense. * * * The receiver is not compelled to make a choice, but has the right to pursue either or both ways of collecting the assessment." (R. I, pp. 151-3; 23 F. Supp. 265, 269-270.) Defendants again urged the same matters in their motion for additional findings of fact (R. I, pp. 268, 281-3). The motion was overruled (R. I, p. 283).

We submit that respondents' argument is not supported by the facts and is not sustained in principle or by the authorities. The unsatisfied and uncollectible judgment against Banco, as the record owner of 95 per cent of the trust certificates representing bank stock, ought not in justice and equity prevent the depositors from recovering from the defendants, as the real and actual shareholders of the Bank, the additional liability imposed by federal statutes.

ATHERTON v. ANDERSON.

86 F. (2d) 518.

The Above Case Is Not a Bar to the Present Action and Cannot Be Used as a Special Defense for 18 Director Defendants.

Atherton v. *Anderson* was an action commenced by the receiver of the bank against the directors of the National Bank of Kentucky (including officer and non-officer directors) to recover damages for losses sustained by the bank. The receiver alleges that these losses were due (1) to a violation by the directors of certain specific federal statutes governing national banks, and (2) to the negligence of the directors in the performance of their duties. The District Court found (1) that the officer directors were guilty of violation of the statutes and negligence, and (2) that the non-officer directors had violated certain of these statutes. The District Court did not pass on the common law negligence of the non-officer directors (7 F. Supp. 924; 9 F. Supp. 151; 11 F. Supp. 9). A large sum was found due from both officer and non-officer directors. The officer directors did not appeal. The non-officer directors appealed. The receiver did not file a cross-appeal. The Court of Appeals reversed the District Court except as to one relatively small item and refused to consider the alleged negligence of the directors on the ground that the receiver had not filed a cross-appeal. (86 Fed. (2d) 518.) This court granted certiorari (300 U. S. 652). After argument this court reversed

the decision of the Court of Appeals and remanded the case, with directions to hear and determine the claim that the non-officer directors were liable on the ground of common law negligence (302 U. S. 643). The exact language used by this court was: "Per Curiam: The Court is of opinion that the Circuit Court of Appeals was in error in ruling that, in the absence of a cross-appeal, the question whether common law liability for negligence would support the decree was not before the court for review. *The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for the determination of that question.*"

After reversal of the decree, and upon reconsideration, the Court of Appeals held the non-officer directors liable for negligence with respect to large losses suffered by the bank, but found that there was no negligence or statutory violation with respect to an undue concentration of loans collateralled by Banco stock (99 Fed. (2d) 895). Following this decision the amounts involved were compromised. A decree was placed of record in the District Court, and upon payment to the receiver of $2,500,000, the receiver "acknowledged satisfaction in full of all claims asserted by him" (Case No. 649 Equity, District Court, Western District of Kentucky). As a result of the settlement the receiver gave up his right to have this court consider and decide questions as to which certiorari had previously been granted. Eighteen of the 2985 defendants in the assessment suit were defendants in the directors' suit.

These 18 former non-officer directors now assert that the reversed decree rendered as a result of the first Atherton opinion (86 Fed. (2d) 518) is *res judicata* of some of the facts with respect to such directors. (Respondents' Br. pp. 91, 101.) It is not claimed that this decree is res judicata with respect to the remaining 2967 defendants who were not parties to the Atherton case. (Respondents' Brief 91, 101.) It would seem obvious without further argument that no plea of *res judicata* can be based upon a reversed decree.

It would also seem obvious that the decree finally entered by agreement of the parties, or as a result of a compromise settlement, cannot be availed of as an authoritative determination of the issues of fact.

Regardless of the reversal and subsequent settlement of this case, both the parties and the issues involved therein were quite different from those involved in the present case. Nothing contained in the Atherton case bars the right of the Receiver in the present case to recover of these eighteen directors the assessment due on the stock owned by them. Both the cause of action and the capacity of the parties involved in the Atherton case was and is entirely different from the present case.

We shall first examine the difference in the cause of action and then the difference in the capacity of the respective parties. The cause of action against the directors was to recover for losses sustained by the bank due to loans made in violation of specific federal statutes and for common law negligence in the management of the bank. The claim of res judicata is based upon the decision that the directors in making loans on the security of BancoKentucky stock did not violate the specific provisions of Section 5201, R. S., 12 U. S. C. 83. This section provides that "no association shall make any loan or discount on the security of the shares of *its own stock*, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." The court of appeals (86 F. (2d) 518, 535) construed this section strictly and held that while it prohibited loans on the security of shares of National Bank of Kentucky stock that it did not prohibit loans on shares of stock of a holding company which held the stock of many other banks in addition to the stock of the National Bank and therefore that the directors were not chargeable with a violation of the statute so construed. Subsequently the court held that there was no negligence based upon an undue concentration of loans on Banco stock (99 F. (2d) 883).

The above statute is not involved in the present case. Liability in the present case is predicated upon an entirely different section of the National Banking Act, to-wit, the assessment statutes which have been construed to impose assessment liability upon the beneficial owners of bank stock even though the same is held of record by others than the beneficial owners and even though the record owner may be a corporation which holds the stock of several banks. In the directors' suit the court said that the BancoKentucky Company was not a holding company solely for the stock of the National Bank of Kentucky and therefore the statute with respect to loans on the bank's own capital stock was not violated. In the present case the Receiver does not claim that Banco was a holding company solely for the stock of the National Bank of Kentucky. Its congenital characteristic was that it should hold both the stock of the National Bank and also that of the Louisville Trust Company and it was intended to and did hold the stock of a group of banks in Ohio and Kentucky. It is axiomatic that the principle of res judicata cannot be applied unless there is an identity between the causes of action in the first and second case. This is recognized in the decisions cited by respondents—*Southern Pacific R. R.* v. *U. S.*, 168 U. S. 1, 48; *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623.

The capacity of the parties in the present suit is different from the capacity in which the parties were aligned in the Atherton case. Obviously the defendants are sued in the present case in their capacity as the beneficial owners of bank stock and not for their actions as directors. Although the Atherton case was also a suit by the Receiver of the bank, the Receiver in that case brought suit against the directors in a different capacity. In the action against the directors the Receiver was suing on an asset of the bank. He sought to enforce the right of action which the corporation itself had against the directors. *Falvey* v. *Foreman State Natl. Bank*, 101 F. (2d) 409 (C. C. A. 7, 1939) cert. den. 307 U. S. 632 (1939); *Wittnebel* v. *Loughman*, 80

F. (2d) 222 (C. C. A. 2, 1935), cert. den. 297 U. S. 716 (1936); *Mickelsen* v. *Penney*, 10 F. Supp. 537 (D. C. N. Y. 1934) and cases collected in Anno. 116 A. L. R. 783, 794.

The liability of stockholders under the assessment statutes is a fund created exclusively for the benefit of creditors. Hence in the present action the receiver appears as a statutory trustee for the exclusive benefit of creditors to enforce the liability of shareholders which "attaches and exists for the exclusive purpose of paying the creditors of the bank equally and ratably." *Van Dyke* v. *Evans*, 20 F. Supp. 640, 642 (D. C. Pa. 1937), aff'd. 97 F. (2d) 18; *Robbins* v. *Mitchell*, 107 F. (2d) 56, 57 (C. C. A. 9, 1939); *Frank* v. *Giesy*, 117 F. (2d) 122, 126 (C. C. A. 9, 1941); *Lally* v. *Anderson*, 194 Wash. 536, 78 P. (2d) 603, 604 (938); *Nieman* v. *Bethlehem Natl. Bank*, 113 F. (2d) 717, 718 (C. C. A. 3, 1940).

When the relationship and capacity of the parties is properly considered it appears that the Atherton suit, while conducted between some of the same individuals who appear in the present case, was not a suit between the same parties because such parties appear in an entirely different representative capacity. In such case the prior decision is not res judicata. *Troxell, Admx.* v. *Del. Lack. R. R. Co.* (1913), 327 U. S. 434.

THE ANOMALOUS POSITION OF RESPONDENTS, SUSIE E. TELLMAN, EMMA BISCHOFF, ET AL.

Several of the defendants in the District Court filed a peculiar pleading designated "Separate Answer, Counter-Claim and Cross Action of Henry M. Johnson, et al." (R. 1, p. 158) and later another paper styled "Amended Answer, Counter Claim and Cross Petition of Susie E. Tellman, et al" (R. 1, p. 168). It is somewhat difficult to determine what is intended by these papers. In the first separate answer of Henry M. Johnson, Susie E. Tellman, Frieda Gudex, Admr. etc., Paragraph 1 admits "that they acquired their stock solely *by original subscription*," but not in ex-

change for National Bank stock (R. 1, p. 158). Thus, it is admitted that these stockholders subscribed to the prospectus and plan of reorganization, and are original subscribers. This pleading answers the facts pleaded in the Bill by saying "that they do not know whether they are true or false, that one or the other is a fact, viz, that they are either true or they are false" (R. 1, p. 159). Then follows a so-called alternative pleading, that *if* the averments are *not* true then these defendants adopt a defense set forth by another defendant, Thomas Trammel, and *if* the allegations of the bill *are* true then these defendants say they may have been defrauded and would in such event wish to rescind their subscription of stock to the BancoKentucky Company and establish some kind of a set off claim against the Receiver.

The second pleading asks that the court treat "the procedure now in process in this action in the nature of a pretrial procedure" (R. 1, p. 168), and move the court for a summary judgment in favor of all those similarly situated against the bank Receiver, adjudging that defendants who subscribed for stock of the BancoKentucky Company and did not acquire the same by the exchange of bank stock have a claim against the assets of the bank for the amount paid for their stock and interest, from the date of payment (R. 1, p. 170).

No allegations of fact are alleged either in the so-called separate answer filed September 8, 1938, or the amended answer filed November 1, 1938. It is not admitted that the facts set forth by the Receiver are true nor are the facts denied. The pleadings are in the nature of an "if" argument; i.e., if certain facts are proved by somebody else, then, these defendants wish to rescind their purchase of stock in BancoKentucky Company and also recover not from that company but from the Receiver of the bank, the price of their stock.

To this alleged counterclaim and cross-action the receiver filed a reply alleging (1) that the so-called pleadings failed to allege any right or claim upon which relief can be

granted; 2. A denial; 3. A denial of jurisdiction to entertain this type of pleading (R. 1, p. 171). Plaintiff prayed that the so-called counterclaim and cross-action be dismissed and that judgment be entered against these respondents as original shareholders of the BancoKentucky Company. No evidence was offered by these respondents in support of their so-called cross-action. Furthermore said respondents stated they did not wish to prosecute the same unless the court decided in favor of the receiver in the principal case. The District Court ordered that said counterclaims and cross-actions be dismissed (R. 1, p. 284).

Notwithstanding the disclaimer of any desire to prosecute said cross-action if the court decided against the receiver, these respondents filed a so-called cross-appeal from the order of dismissal, but in the statement of points (R. 1, p. 297) the cross-appellants again stated that the cross-appeal was only prosecuted *if* and in the event the Court of Appeals should reverse the lower court. The Court of Appeals affirmed the judgment below dismissing the counterclaim and cross-action of Tellman, et al. No further effort was made to review this portion of the order below. This court has not been asked to grant certiorari by the cross-appellants below.

The Alleged Counterclaim of Respondents Tellman, Bischoff, Et Al., Is Not Properly Before This Court.

A brief has been filed styled "Brief for the Appellees and Cross-Appellants Susie E. Tellman, Emma Bischoff and Other Class B Defendants Similarly Situated". The so-called counterclaim was dismissed by the District Court. On cross-appeal this order was affirmed by the Court of Appeals. No effort has been made to review, reverse or modify this part of the order below, which is now final. Certiorari was not asked by said cross-appellants. Under these circumstances, we submit the matters urged in the brief in their behalf are not properly before the court. This

has recently been decided in *LeTulle* v. *Scofield*, 308 U. S. 415, 421 (1940):

> "A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him."

The pleading styled a counter claim is an anomalous proceeding without basis of fact or law. It is not supported by any evidence nor by the proffer of any evidence. It was only asserted contingently. The contingency was that the lower court make a finding which that court did not make. It is asserted only "if" the court hold Banco to be a fraudulent corporation. This is unique and unprecedented. Respondents make no positive claim and allege no facts. They present no record. No prejudice resulted from the dismissal of the alleged counter claim. There was in fact nothing from which a cross appeal could properly lie. Respondents make no complaint as to the decree entered in the lower court. We submit that under these circumstances there is no justiciable issue to be considered here.

Purchasers of Banco Stock Who Did Not Previously Own Bank Stock Are Liable for Their Proportionate Part of the Assessment.

The claim is made in the Tellman brief that the small percentage of stock owned by persons who had not previously owned bank stock should be considered in a separate category as "Class B" and that these shareholders should not be held liable for their proportionate part of the assessment because they were innocent of the "fraud", if any, of the bank in organizing Banco. It is further argued that if they are held liable for the assessment they should be granted a counterclaim against the Receiver of the bank.

The record shows that Tellman borrowed money from the

bank and used it to pay for Banco stock (Ex. V. 5, p. 2147). No Banco stock was sold by the bank to Tellman or other stockholders. Tellman et al. contend that they should be considered "purchasers for cash of Banco stock made up of the outside public who had nothing to do with the organization of Banco" (Tellman brief, p. 5). This is not true with respect to Tellman. She was an original subscriber for Banco stock (Ex. 148). She signed the original subscription agreement (Ex. V. 3, p. 1142) for stock in accordance with the reorganization plan outlined in the letter of the trustees dated July 19, 1929. Other respondents aligned with Tellman had no dealing with the bank and even the imaginary basis for the hypothetical claim of Tellman is missing with respect to the others.

All purchasers of Banco knew of its purpose to acquire and hold a chain of banks. The record shows that this was widely advertised. Tellman and the other respondents whom she purports to represent participated in the published plan and will not be heard to say that they defrauded themselves. Tellman got exactly what she subscribed for—bank holding company stock.

Neither Tellman nor any of the respondents have ever rescinded their purchase of bank holding company stock nor tendered back the dividends which they collected thereon.

Only one subscriber who had not previously owned bank stock testified. He said that he knew Banco held bank stocks—"We were getting dividends. Certainly I was aware that they were interested in banks; everybody knew it. It was the general opinion * * * I would have to acknowledge I did learn that they owned practically all of it (stock of the National Bank of Kentucky) * * *" (R. 2, p. 214). He said he knew that at the time he was getting dividends and decided to keep his stock with that knowledge. (R. 2, p. 215.)

The same contention was made in one of the appeals growing out of *Barbour* v. *Thomas*. In the Detroit case it appeared that over eight per cent of the stock was

acquired otherwise than by exchanging bank stock for holding company stock. (86 F. (2d) 510, 516.) It was claimed that this "otherwise acquired" group were not liable for assessment because they bought bank holding company stock after its organization. This claim was specifically overruled and the "otherwise acquired" group were held equally liable. In *Ullrich* v. *Thomas*, 86 F. (2d) 678, (C. C. A. 6, 1936), cert. den. 301 U. S. 692, (1937) the court said that they "in common with other stockholders of the holding company received dividends from it through this holding company" and could not escape the burdens which followed their beneficial ownership. (86 F. 2d. 678, 679.)

In the present case approximately ninety per cent of the shares of Banco were held by individuals who had previously held bank stock or subscribed to the original plan of reorganization. Approximately ten per cent was otherwise acquired. (R. 2, pp. 126-129.) None of the "otherwise acquired" group testified at the trial. None of them disclaimed knowledge that Banco's primary purpose was to acquire a chain of banks. The language of the Court of Appeals in *Nettles* v. *Rhett*, 94 Fed. (2d) 42, 48, is highly appropriate. "Given the fact that the holding company invested in nothing but bank stock and finally held nothing but stock of the bank created by the mergers, we cannot assume that the preferred stockholders had no knowledge of the condition of their investment."

In the instant case the testimony is that this knowledge was "public property." "Everybody knew what was going on all the time." (R. 2, p. 228.)

As Judge Sullivan said in the case pending in the Northern District of Illinois (22 F. Supp. 853): "Everyone dealing in the stock of Banco was bound to know what its assets consisted of, and knowing that such assets were the Trustees Participation Certificates which represented the stock of the bank, they were then bound to know that a statutory liability was imposed on such stock by statute."

Tellman and those aligned with her can not defeat the assessment liability by interposing this contingent "if" pleading. They have no claim against the bank and could not maintain one without first paying their assessment. *Oppenheimer v. Harriman National Bank and Trust Company*, 301 U. S. 206 (1937).

CONCLUSION.

We respectfully submit that the judgment below should be reversed.

ROBERT S. MARX,
FRANK E. WOOD,
EDWARD M. BROWN,
HARRY KASFIR,
Attorneys for Petitioner.

Of Counsel, for Petitioner,
NICHOLS, WOOD, MARX & GINTER.

JOHN F. ANDERSON,
Chief Counsel for
Comptroller of the Currency.